

February 4. 1767.

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Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N

O F

ROBERT HUNTER merchant in London,

Humbly sheweth,



THAT of this date James Berry, late merchant in Edinburgh, drew bill on the petitioner, payable to Hugh Campbell merchant in Edinburgh, of the following tenor: June 19. 1765.

“Sixty days after date, pay this first *per exchange*, to Mr Hugh Campbell, or order, forty nine pounds Sterling, value received, and place it to account, as advised.”

That this bill was indorsed by Mr Campbell to Mess. Maudsly, Dakings, and Company, cheese-mongers in London, and forwarded to them by that post, in payment of an account due by him to them; and upon its being presented to the petitioner, he told he would not accept the same; but whether they advised Mr Campbell of this, the petitioner knows not.

That soon thereafter Berry the drawer failed, and fled the country; and the petitioner heard no more of the draught till the 21st of August, being the last day of grace in the bill, when the indorsee did present it again to the petitioner, and demanded payment, as it had then become due; which the
A petitioner

petitioner having refused, as he had not funds in his hands to answer it, it was protested by them in the usual form.

However, the petitioner having been informed by one of his own clerks, that Mr Campbell was in very good credit, so, in order to prevent the bill's being returned upon him with exchange, re-exchange, &c. the petitioner paid the bill *supra* protest, for the honour of Mr Campbell the indorser, as appears by the protest and receipt of the contents subjoined thereto.

As the petitioner had no other view in making this payment than to do a good office to Mr Campbell, so he wrote him the very day it was paid, informing him of what he had done, and drew on him for the value; which he never doubted would be duly honoured, with thanks: But, to his no small surprize, he found the contrary; Mr Campbell not only refused to pay the money, but even to submit the same to either merchant or lawyer, though the same had been again and again offered by the petitioner's doer.

Dec. 6. 1765. This obliged the petitioner to bring an action before the court of session; which came in course before the Lord Gardenston Ordinary; who, after hearing parties, ordained Mr Campbell to give in a particular condescendence of the facts which he insisted the petitioner should confess or deny, and that betwixt and the 10th then current; and in the mean time granted warrant for letters of incident diligence at the defender's instance, for recovering Mr Berry's books, or copies of letters from him to the petitioner, or letters, or copies of letters, from the petitioner to him, relative to the bill in question, and any other writing which he may think material in the cause.

A condescendence was accordingly given in by the defender. The petitioner, who acted *optima fide* in this affair, did not oppose any examination or expiscation of the truth; and therefore a commission was granted to Mr Gordon at London, which was returned with the report; and the defender

fender having failed to extract his diligence, and so having given up further proof, the term was circumduced against him, and which is now become final.

The defender's counsel having craved to be allowed to give in a memorial upon the cause, and mutual memorials having been put in accordingly, the Lord Ordinary, before answer, remitted this process to Archibald Trotter merchant Feb. 25. 1766. in Edinburgh, to make up a state of accounts, and report his opinion of the matter in dispute.

Mr Trotter having carefully perused the whole process, and heard the doers on both sides, gave in a most distinct report, bearing in substance, That it appeared the petitioner had refused to accept the bill, and never gave any promise or assurance that he would either accept or pay the bill; and that Berry then was owing the petitioner a balance of L. 779 : 4 : 10 Sterling: That it appeared the petitioner, after this, neither knew, nor was it his duty to inquire, what steps Dakings and Company, the holders of the bill, had taken, either in extending the protest, or giving notification of its being refused acceptance; neither, by the practice of merchants, was it incumbent on Dakings to present the bill for acceptance: That upon the 21st August, when the bill became due, Berry was in the petitioner's debt L. 62 : 8 : 5; and as no irregularity appeared *ex facie* of the bill, he was of opinion the petitioner was at liberty to retire the bill, under act of honour for Mr Campbell, who is bound to reimburse him, leaving him to *age* as accords against Dakings and Company, his correspondents.

And the Lord Ordinary thereafter, upon advising of the whole cause, of this date, pronounced the following interlo- June 13. 1766. cutor. " Having again considered the memorials, with Mr " Trotter's report, finds, That there is no evidence that the " pursuer became bound or promised to accept the bill in " question. Finds, That the defender has failed in proving " any fraudulent dealing or collusion betwixt Dakings and " Company

" Company and the pursuer. Finds, That the pursuer's letter to the defender of the 21st of August 1765, affords no conclusive evidence, that there was a balance of L. 20 due by the pursuer to Berry. Finds, That by the accounts now produced, there is a balance due by Berry to the pursuer; and therefore finds the defender liable for payment of the bill libelled, and decerns; without prejudice to the defender's action for relief against Dakings and Company for neglect of due negotiation or notice."

July 8. 1766. The Lord Ordinary thereafter, of this date, found expences due; and ordered an account to be given in. But the defender having preferred a representation, his Lordship, upon

— 24. 1766. advising the same, with answers, of this date, pronounced the following interlocutor. " Adheres to the last interlocutor; and finds no expences due but the expences of extract, as the same shall be ascertained by the collector of the clerks dues; and decerns." And upon advising a representation for the petitioner, and answers for the defender,

Jan. 20. 1767. his Lordship, of this date, pronounced the following interlocutor. " Having considered this representation, with answers, in respect of the particular circumstances of this case, refuses the desire of the representation, and adheres to the former interlocutor."

Of these interlocutors the petitioner craves your Lordships review; and he humbly hopes, that you will be of opinion, that he is intitled to a full indemnification; and, of consequence, not only to the expences of the extract, but also to the full expences of process.

The petitioner, with all submission, cannot help thinking, that the defender has acted a very improper part towards him, who gave away full value for the foresaid bill out of his pocket; and in doing of which he could not possibly have any other motive than to serve the defender. For however it was alledged, in the beginning of the cause, that it was done in the view of serving the porteurs of the bill,
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this averment is now given up by the defender. It now appears, that it was a random allegation, for which there was no foundation; for that the petitioner was not in the least acquainted with Dakings or partner, and that he did not so much as see either of them upon the occasion. When, therefore, the petitioner acted purely from disinterested principles, and in the view only of doing a good office to the defender, by preventing the bill's being returned upon him with damages, he had good reason to expect a very different return from what he hath met with, and that the money would have been thankfully repaid him; yet, in place thereof, he meets with a positive refusal to pay one penny of the sum, notwithstanding it is a point fixed and established in the practice of merchants, and in the law of this country, That the petitioner's claim for repayment of the money was well founded; and which has been accordingly so found, by a judgment of the Lord Ordinary, now become final. The petitioner, however, anxious to avoid a law-suit, offered a submission before commencement of the action, to any person of character; which was refused: and therefore, as he was forced into the supreme court to recover a claim which was perfectly clear, and in which he has met with all the opposition which was in the power of the defender to give him; and as the defender endeavoured to support the defence by random allegations, and which were highly injurious to the petitioner's character; he, with all submission, apprehends, that he is intitled to a full indemnification; that the defender's conduct hath been inconsistent with that good faith which ought to prevail among merchants, and without which extensive trade cannot be carried on; and that as such a conduct must be hurtful to the commercial credit of this country, it is hoped that your Lordships will testify your disapprobation of it, by awarding full expences.

The defender made a merit of acquiescing in the Lord Ordinary's judgment, as to the principal cause. But the petition-

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er, with all submission, cannot attribute any merit to him on that account. It is extremely plain, from the whole of his conduct, that it did not proceed from a peaceable disposition; the contrary thereof appeared before the commencement of the action, in rejecting every amicable accommodation; and therefore the petitioner can attribute his acquiescence in the Lord Ordinary's judgment to nothing else than a consciousness of the badness of his cause.

The defender, in struggling against the petitioner's claim of expences, was pleased to say, That he had good reason to refuse payment of the money to the petitioner; for that a person paying for the honour of another was not intitled to be reimbursed of his money, unless it should appear, that he had acted profitably, and for that person's benefit: whereas, in the present case, he hath been subjected in payment of the money twice; which would not have happened if the petitioner had not interfered, and paid the draught for the defender's behoof; for that Dakings and Company, on account of their failure duly to negotiate the bill, would have had no recourse against him.

But, with all submission, the defender's argument does proceed upon a misapprehension of the nature of a payment *supra* protest, for the honour of a drawer or indorser. The defender seems to consider such payment as of the nature of a *negotiorum gestio*, for behoof of the person for whose honour the payment is made; and that therefore, unless it shall appear that the money was expended *utiliter*, and for the advantage of the person for whose behoof it was paid, he is not intitled to repetition.

Payments for the honour of a drawer or indorser of a bill are extremely well known, and practised over all the commercial world; and are of very great use in the course of trade, as considerable sums for damages, exchange, and re-exchange, are frequently thereby saved: but if merchants were to act the part that the defender hath done on this occasion,

sion, or if the ideas which he seems to entertain were founded in law, an end would very soon be put to such a practice. — If the person making the payment were obliged to submit to an inquiry, whether the porteur of a bill had acted a right or wrong part, or whether such exception did lie to his conduct as would be sufficient to deny him recourse, no man of common understanding would take it upon him to make a payment for the honour of another, when, however opulent the person for whose honour he paid was, he would very probably be involved in a law-suit, or might be disappointed of his payment altogether.

The ground of the petitioner's claim, and of every person in his circumstances, stands upon a very different footing. He apprehends, that the person making such payment has no business to inquire into the conduct of the porteur of the bill, of which it is impossible he can have a certain information; no more enters into the consideration of the person making the payment, than the credit of the person for whose behoof it is made; and whether the bill is, *ex facie*, a good and unexceptionable bill.

It is fixed and established over all the mercantile world, That bills are considered as bags of money passing currently from hand to hand, without being clogged with any exceptions that don't appear *ex facie* of the bill; and therefore, when any man takes an indorsation to a bill, if he shall not recover his payment from the person drawn upon, he has recourse against all the drawers and indorsers; nor will any exception of payment or compensation, not appearing upon the bill itself, or on account of not due negotiation, which perhaps might be competent to some of the intermediate indorseees in a question with one another, be competent against an after onerous indorsee.

And therefore there can be no doubt, that if Dakings and Company had indorsed away this bill to a third party for value, he would have been intitled to recourse against this defender;

fender; nor would any exception which he might have had against Dakings and Company, been available to him to deny recourse in a question with the onerous indorsee. Now, your Lordships will observe, that although the person upon whom the draught is made, has no effects in his hands of the drawer's, and so may refuse to pay or accept; yet there is nothing to hinder him, *tantum quilibet*, to take an indorsation to the bill, and he will have the same recourse against all the drawers and indorsers that any other onerous indorsee would have had. The only difference is, that where he takes a right to the bill, he must do it *supra* protest; otherwise it would be understood and presumed, that he was answering the draught, and so paying the money *ex mandato* of the drawer only.

At the same time the petitioner cannot discover how the defender can be said to have suffered by the payment made by the petitioner; but that, on the contrary, the claim of damages, which Dakings and Company would have had against him for the draught's not being honoured, was thereby saved: for if the petitioner had not paid the contents of the bill to Dakings and Company, they would have had recourse against the defender for the contents, and also for exchange, &c. providing the bill was duly negotiated; and if they failed in that point, which it is not the petitioner's business to inquire into, he has a good claim against Dakings for the damages he sustains on that account; and this claim they are abundantly able to answer, if well founded.

The defender, conscious that the question in the abstract stood clearly against him, endeavoured to difference this case from the general point, by alledging, That the petitioner had been guilty of fraud and collusion, and that he made the payment in the view of putting into the pocket of Dakings and Company a sum of money, which otherwise they could not have recovered, as their conduct would have denied them recourse against the defender.

If the petitioner had truly been guilty of fraud or collusion, it would have been a good ground for affoilzieing the defender altogether from the claim; but that question is now at an end: the defender has been found liable, by a judgment of the Lord Ordinary, in the contents of the bill; and as that judgment has become final, it must be invincible evidence, that there was no ground for a charge of fraud or collusion against the petitioner.

And this being the case, the making of that charge is so far from being a reason for affoilzieing from expences, that it affords the strongest reason in the world why full expences should be given; for where a party refuses to pay his just debts, and not only forces the creditor to have recourse to a court of law to obtain redress, but where, in defence against just debt, he makes a wanton attack upon the character of the petitioner, especially that of a merchant, to whom his character is of the highest importance, in law and in justice he is surely intitled to a full indemnification, which cannot be given him, unless by awarding the full expences of process.

It was most unjustifiable upon the part of the defender, to make an open charge of collusion against the petitioner, when he has not been able to bring the vestige of evidence in support of that charge. On the contrary, it appears, that the petitioner had no connection, or even acquaintance of Mr Dakings; and consequently, what he did could be designed in no other view than to serve the defender.

It was said for the defender, That he had good grounds to apprehend, that the petitioner had either accepted, or promised to accept, the bill when presented; for that the letter from Dakings to him, of the 25th June 1765, acknowledged the receipt of the bill in full of his account. *2do*, That by the petitioner's letter to Berry of the 27th June 1765, he did not say a word of his having declined to accept; and that the petitioner did, after this bill was presented to him, pay a bill
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that was drawn on him payable to Ainsly; and that the defender got no advice from Dakings for near two months there-
after of the refusal of the bill.

But it has been already observed, that the conduct of the porteur of the bill, or any of the intermediate indorsers, cannot in the least affect the claim of the person paying the bill, for the honour of either drawer or indorsers. If the defender has suffered damages from the improper conduct of Dakings, let him *age* against him as accords; but the petitioner has no business to inquire whether Dakings and Company have failed in their duty or not.

As to the petitioner's letter to Berry, a copy of which is hereto subjoined, it seems a strange conclusion, that because he does not particularly mention his having refused acceptance of the defender's bill, therefore it must be held to be accepted. Berry had no occasion for such information; the petitioner made no doubt that such information would be given him by the porteur of the bill.

And as to the petitioner's having paid other bills of Berry's, he gives a most satisfying account thereof in his declaration, *viz.* That remittances were either made by the same post which conveyed the bills, or that he was possessed of goods, as he believed, sufficient to answer such bills.

If the defender thought proper upon suspicions to refuse payment to the petitioner, it will by no means screen him from expences, when it appears, that his suspicions were groundless, and not in the least supported by any degree of evidence. It is much more reasonable, that the defender should suffer for founding, against the payment of a just debt, upon rash and unsupported suspicions and conjectures, than that the petitioner, in recovering payment of a just and unexceptionable claim, should be obliged to lay out one half of the sum in expences at law.

The defender says, That he had good cause to believe, from the petitioner's own letter to him of the 21st August

1765,

1765, that he had funds of Berry's in his hands; and that therefore the defender had a good title to demand satisfaction in that matter.

A copy of the letter is hereto subjoined for your Lordships perusal; and the petitioner is humbly persuaded, that no defence against the claim for expences can from thence arise. It was owing to the petitioner's fair, honest, and open dealing with the defender, in telling what he then believed to be the case, that the foresaid circumstance has been founded upon; and as the petitioner would have given full satisfaction in that matter to the defender, from his books, without the expence of a law-suit, and which was all the satisfaction which the defender could, or was intitled to demand, he cannot be allowed to avail himself of that circumstance.

But, *2do*, It is in vain for the defender to pretend to shelter himself under this subterfuge from the present claim of expences, when it appears, that the defender did not put the issue of the cause there; but pled a total defence against the claim, *viz.* That the petitioner had acted a fraudulent part, in collusion with Dakings, in order to put into Dakings's pocket a sum of money which he otherwise would not have been intitled to.

It was said for the defender, That the petitioner did not pay the bill in question till Berry's bankruptcy was known; and that therefore, when he paid the bill for the honour of the defender, he was in justice bound to see that the bill had been so negotiated as that the holder could have recourse upon the defender: That the petitioner knew that the bill had been presented to him near two months before, and that he had refused to accept; he therefore knew that it ought then to have been protested for not acceptance; and that by the neglect thereof the porteur had lost all title to recourse against the defender; and that therefore the petitioner was *in pessima fide* to pay it.

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But these things are highly improper to be insisted upon, after having been over-ruled by a judgment of the Lord Ordinary, which has become final. If there was any relevancy in the defence, it would go so far as to afford a good defence against the action; but as all the defences have been repelled, and have been found unavailable by the Lord Ordinary, they cannot now be insisted on in bar of the claim of expences.

The petitioner has no occasion to enter into the question, How far it was incumbent upon Dakings to protest for not acceptance, and recourse, before the term of payment of the bill? neither does he know to this day, whether such protest was taken or not, or if notification was made to the defender. These were matters with which the petitioner had no concern. He had refused acceptance of this bill the moment it was presented; he never heard of it again for two months; and at that distance of time, he did not remember whether the bill had been presented or not. The bill might have been presented unknown to him. He might, for any thing the petitioner knew, have given due notification to the defender of the refusal to accept. The petitioner had no access to know whether Dakings had preserved his recourse. That was a matter he had no business to inquire into. It would put bills upon a very uncertain footing, if such inquiries were at all necessary. He paid the bill for the honour of the defender; and no exception he might have had against Dakings can affect the petitioner, who is in the same situation, *quoad* the ~~petitioner~~, as any other onerous indorsee. If the defender has suffered damages by the improper conduct of Dakings, let him *age* against him as accords.

The defender in this cause lays a great deal of stress upon an opinion which he got from Mr Hogg merchant in Edinburgh, and which he has thought proper to produce in process; and he says, that it was in consequence of this opinion,

nion, which was taken before any litigation ensued, that he defended himself against the present claim.

A copy of the opinion is hereto subjoined; and, with all deference to that gentleman, the petitioner will be forgiven to say, that it appears to him to be a most erroneous opinion. The petitioner has been at pains to apply to sundry merchants and bankers, of the first character, both in London and Edinburgh; and they all disagree with Mr Hogg in the opinion he has given. And the petitioner hath accordingly produced in process an opinion, signed by numbers of merchants of the first character in London, determining the case quite the other way.

At the same time the petitioner must observe, that this opinion cannot well be founded upon as an excuse for his standing a law-suit, when it only bears date the 6th of February 1766; at which time a great deal of procedure had been made in the cause, and the proof had been concluded.

The absurdity of the foresaid allegation having been pointed out upon the part of the petitioner, the defender, in his answers to the last representation, was pleased to explain away his former averment, by saying, that he had got a verbal opinion from Mr Hogg before the commencement of the action. As to which the petitioner shall only observe, that although he is entirely ignorant of what conversations may have passed betwixt the defender and Mr Hogg; yet the petitioner does aver, upon the very best information, that before the action was brought into court, the defender was told by one of the most eminent bankers in Edinburgh, that his plea was not tenible.

Upon the whole, the petitioner holds it to be a clear point, that the merits of the principal cause was with him beyond the possibility of dispute; and that the defender, by refusing payment, acted contrary to that good faith which ought to obtain among parties in every mercantile transaction; and as the petitioner has been put to a very consider-

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able expence, in obtaining payment of a debt which the defender, in law, honour, and good conscience, ought to have repaid him chearfully, and with thankfulness, he is humbly persuaded, that, upon considering the case, your Lordships will have no difficulty to be of opinion, that he ought to be fully indemnified; and, of consequence, that he is intitled to the expences of process.

*May it therefore please your Lordships, so far to alter the
foresaid interlocutors of the Lord Ordinary; and to find the
petitioner intitled to his full expences.*

According to justice, &c.

RO. MACQUEEN.

Copies of letters, and other papers, referred to in the foregoing petition.

Letter, Robert Hunter pursuer, to James Berry merchant in Edinburgh, in answer to Mr Berry's letter, advising of drawing on him the bill in question, payable to Hugh Campbell, defender, dated, London, 27th June 1765.

Mr James Berry, — Sir, — Since my last, I received yours of the 18th and 20th, advising of some draughts on me; and that you was to remit the following post for them, and for the L. 600 due the 28th; but I have not received them. I hope the morrow's post will bring me something. If you cannot do otherwise, must remit me for the L. 600 on M. N. and drawn on me to him; though am afraid I must draw on you before I have your answer. There is L. 500 of yours
due

due July 4th, and L. 250, 14th; which I beg you will not neglect. It would give me great pleasure that you were a little more punctual in these transactions. Assuring me of a remit from post to post, and not making them, is very disagreeable. I am yours, &c.

Letter, Robert Hunter pursuer, to Hugh Campbell defender, dated London, 21st August 1765.

Mr Hugh Campbell, — Sir, — Herewith inclose you bill and protest J. Berry on me, which, (having no effects of the drawer's), I retired for your honour, L. 49:5:3; and have this day drawn on you for same to Mess. Cumming and Son, with the exchange at $2\frac{1}{2}$ per cent. L. 50:9:10, at thirty days, which I dare say you will duly honour. — If you are not secured with James Berry, I believe I shall have about L. 20 over on settling accounts, which shall be at your service; and if you return me the bill for this purpose, it will save the charges of an attachment. I take this opportunity to make you an offer of my services in this place; and am, Sir, your's, &c. (Signed) ROB. HUNTER.

P. S. I said I should have about L. 20 over of Berry's effects; but it will be some time before it comes to my hand, as part of my security is a share of a fishing in the river St Lawrence, of which I am the agent in London; he put in L. 250, of which there will be only 33 per cent. got, the affair being finished; but the remittance for his share is not yet come to my hand.

R. H.

Pursuer's declaration, taken at London, upon commission from the Lord Ordinary, by Mr William Gordon solicitor there, dated 7th January 1766.

Appeared in presence of the commissioner aforesaid, the before-named Mr Robert Hunter of London merchant; who

who being examined and interrogate with respect to the several facts and circumstances mentioned in the act and commission before recited, *declares*, That he received, upon the 24th June last, a letter dated the 20th said month of June, from John Kerr clerk to Mr James Berry of Edinburgh, advising him of Mr Berry's bill for L. 49 Sterling, to the order of Mr Hugh Campbell; and upon the 27th of said month of June, the declarant returned an answer to the said letter; and the said original letter, with the declarant's answer subjoined thereto, is now exhibited, and is marked and signed by the declarant and commissioner, as relative to this declaration. *Declares*, That within a day or two of the declarant's receiving the letter of advice before mentioned, the foresaid bill of L. 49 was presented to the declarant for acceptance, and the declarant refused to accept the same; and, so far as the declarant knows or can remember, the answer given was, That he had not effects of the drawer in his hands; and that at this time the declarant did not know, or did not observe, that the bill was indorsed to Mess. Maudsly Dakings and Company. *Declares*, That he is not acquainted, nor did he ever see, so far as he knows, Mess. Maudsly or Dakings, or any of that company; nor did he ever give any promises or assurances to them, or any employed by them, that he would either accept or pay the said bill. And *declares*, That he never heard of the said bill from the time he refused acceptance of it as aforesaid, until the 21st August, when it became due; and the declarant then paid the bill upon a *supra* protest, for the honour of Mr Hugh Campbell the indorser, having been informed that Mr Campbell was a good man, and the declarant being willing to oblige him. *Declares*, That he had not effects of James Berry the drawer in his hands or power sufficient to answer the said bill at the time he refused the acceptance thereof. But *declares*, That he accepted and paid some bills between the said 27th June and 21st August; for all of which bills remittances were either made by the
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same post which conveyed the bills upon the declarant, or the declarant was possessed of goods, as he believed, sufficient to answer such bills as they became due; and the declarant exhibits an account-current between the said Mr James Berry and him, commencing 8th April 1765, and ending 22d October last; and another account of goods transmitted by and sold for account of Mr James Berry, commencing the 17th October 1764, and ending 21st August last; and which accounts are marked and signed by the declarant and commissioner as relative to this declaration. *Declares*, That these accounts contain all the transactions between the said Mr James Berry and the declarant, during the periods mentioned in the said accounts; and from thence it will appear what bills were drawn upon or paid by the declarant, after his refusal to accept the bill in question, and what effects were in his hands at the different periods therein mentioned. And *declares*, That there is still due to the declarant, by the said James Berry, a balance of L. 85, 7 s. as stated in the account-current before mentioned. *Declares*, That he is possessed of no letters or writings relative to the said bill of L. 49 now in question, nor knows or suspects where such letters or writings now are, other than such as are particularly before mentioned. But *declares*, That upon the 6th July last, the declarant wrote Mr Berry, he had accepted all his bills, except one to Gilchrist for L. 100; and the declarant did so, because he believed that all the bills which had been presented to him for acceptance, and refused, of which there were several besides the bill in question, had been actually returned upon the drawer, except the foresaid bill to Gilchrist, which the declarant was often solicited to accept, and was in hopes Mr Berry would make a remittance for payment of this bill; but which having never been done, the bill was never either accepted or paid. And being further interrogated, *declares*, That he several times wrote Mr Berry, that he would come under no further acceptances for him,

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unless remittances or consignments were actually made to him for answering such bills; but the declarant did not, as he believes, particularly inform Mr Berry of his refusal to accept the bill in question, as the reason of such refusal must have appeared from the whole tenor of his correspondence. *De-clarer*, That the said bill being in the hands of Sir Charles Apgill and Company, and application having been made to the declarant when the bill became due, the declarant told Mr Wichenden, one of the partners of that house, that he had no effects of the drawers. but that he would pay the bill for honour of Mr Campbell the indorser, upon a *supra* protest; but the declarant had no application made to him from Mess. Maudsly and Company, or any person belonging to them, for that purpose.

Opinion of London merchants, upon recourse, of one paying a bill of exchange supra protest, for the honour of a drawer or indorser, dated, London, 26th November 1765.

WE, whose names are hereunto subscribed, merchants residing in London, do certify, That, according to the law and custom of merchants, relative to bills of exchange, when a bill drawn on any person is protested for non-acceptance, or non-payment, any other person may, if he thinks fit, accept or pay the same under protest, for the honour of the drawer, or any indorser, of the same bill, without any special order or direction from such drawer and indorser to that effect; and that any person on whom a bill is drawn, not having effects of the drawer, or not chusing for other reasons to accept or pay the same for account of the drawer, may, in like manner, accept or pay such bill under protest for the honour of any indorser of the same: And in every such case, upon transmitting the bill, protest, and act of honour, with a receipt thereon for the amount of the bill, the person

person for whose honour such bill is so accepted, or paid, is undoubtedly liable to make good the same to him who paid it, together with the exchange, charges, and commission. Witness our hands, at London, 26th November 1765. (Signed by) *Simon Frazer. Robt. Alexander and Robt. Maitland. Fordyce, Grant & Co. Wm Snell & Co. Mackay & Campbell. John Cornet & Co. Chas Fergusson. Walter & John Ewer. Hanson, Clark, & Co. Adam Wood. Houston Clark & Co. Robt & James Christie. Alexr Anderson and Davidson. Edie & Laird. Wm Innes. Wm Crichton. Robt and Robt Bogle & Scott. Herris Cochran & Co. Geo. Johnston and Co.*

Mr Thomas Hogg merchant in Edinburgh his opinion upon the case between the pursuer and defender, dated 6th February 1766.

MR Hogg has looked over the papers relative to the dispute betwixt Robert Hunter and Hugh Campbell. The custom among merchants is, in such cases, that when a person to whom a bill is indorsed has presented it for acceptance, and that it is refused, he always notifies that refusal to the person from whom he had it, which is looked upon as the duty of the holder, in order that the person from whom he had it, may have an opportunity of demanding security from the drawer. Mr Hogg observes, from Robert Hunter's declaration, that the bill was presented soon after it came to Mr Dakings's hands; and it would seem, after Mr Hunter had advice from Mr Berry of its being drawn, and that it was refused acceptance of by Mr Hunter, which was never notified to Mr Campbell by Mr Dakings, and therefore was not properly negotiate, so ought not to have been taken up by Mr Hunter for Mr Campbell's honour, against whom Mr Dakings had not proper recourse by the dishonour of the bill not having been notified to him. Mr Hogg knows, that there is some doubt among merchants, whether a person is

obliged to present a bill for acceptance when it comes to his hand ; but he humbly thinks, that where it has been presented, and refused, the dishonour it meets with should be immediately notified, or a protest for non-acceptance sent to the person from whom the holder had it. Upon the whole, Mr Hogg is humbly of opinion Mr Campbell ought not to be liable to Mr Hunter, who should have been satisfied that the bill was duly negotiate, before he took it up for Mr Campbell's honour.

February 6. 1766. At desire of Mr David Rae, I have looked through the process betwixt Hunter and Campbell, and I am humbly of opinion as above.

THOMAS HOGG.

Mr Archibald Trotter merchant in Edinburgh his report upon the said case, in obedience to the Lord Ordinary's appointment, dated 3d March 1766.

THE subject of dispute between the parties is a bill of L. 49, drawn by James Berry merchant in Edinburgh upon the pursuer, payable to the defender, and which the defender indorsed to Maudsly Dakings and Company, of London, to whom the pursuer paid the contents when due, for honour of the defender, and now pursues him for recourse or repetition of the money. The defender refuses, alledging, that the pursuer had agreed to accept it for account of the drawer, that he had effects of Mr Berry's in his hands at the time, and that said bill was not duly negotiate by Maudsly Dakings and Company, the holders.

To these matters, I am humbly of opinion, That the pursuer's letters to Berry, of the 27th June and 6th July, does not amount to a promise of acceptance : That when the bill was presented to him for that purpose, about the 26th June, by

by Maudsly Dakings and Company, the pursuer refused to accept, and never gave them any promise or assurance that he would either accept or pay said bill. This appears by the pursuer's declaration, which the defender insisted upon. From the state of accounts produced at this period, when the acceptance was demanded, I find Berry the drawer was owing to the pursuer L. 779 : 4 : 10 Sterling, as appears as under, viz.

Due by Berry, on his cash-account, to the pursuer,	-	-	-	£. 3249 8 10
Due to said Berry, on his account of goods,				2470 4 0
Neat balance due by Berry to the pursuer,				
26th June,	-	-	-	£. 779 4 10

From that period, to the time the said bill became due, of this date, the pursuer did not know, nor was it his duty to inquire, what steps the holders had taken with regard to extending the protest on the refusal, or as to the notification. These were matters with which he had no legal concern, or was to presume (if necessary) would be neglected, tho' he might have asked. But it is here to be observed, that by the practice it is not incumbent on the holder of a bill at date, or payable on a day fixed, to present for acceptance, though most people does it, as they thereby get an additional security for their money : But it would look awkward to compel a man to ask for more security than he inclines. When said bill was presented for payment the 21st of August, Berry the drawer owed the pursuer L. 62 : 8 : 5, as appears by the state of the accounts produced, and that without the pursuer having any effects in his hands for his reimbursement, viz.

Aug. 21.

Paid

Paid by the pursuer for Mr Berry,	-	L. 8274 18 1
Received from Mr Berry's remittances and effects,	- - - -	8212 9 8
Balance due by Berry to the pursuer, 21st August,	- - -	L. 62 8 5

In this situation, and considering by this time that Berry the drawer was failed, it was not to be expected that the pursuer was to meddle with the bill for his account; and therefore, as no irregularity appeared *ex facie* of the bill, and that the pursuer, by his declaration, has in the most satisfactory manner cleared himself of every suspicion of collusion, I am humbly of opinion he was at liberty to retire the bill in question, under act of honour for the defender's account; and that he falls to be reimbursed by the defender; leaving him to *age* as accords against Maudsly, Dakings, and Company, who, I think, has not used the defender altogether well; and shall be glad if he can get relief from them.

Edinburgh, March 3. 1766. What is on this, and the three preceding pages, is my report in the cause of Robert Hunter pursuer against Hugh Campbell defender.

ARCH. TROTTER.

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